MOTION FILED
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No. 99-1399

In The
SUPREME COURT OF THE UNITED STATES

BONNIE BRIAR SYNDICATE, INC.,

Petitioner,

v.

TOWN OF MAMARONECK, TOWN BOARD OF TOWN OF MAMARONECK, ELAINE PRICE, Supervisor, KATHY O'FLINN, PAUL RYAN, VALERIE O'KEEFE, and BARRY WEPRIN, as Members of the Town Board,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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March 23, 2000

22pp

MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

The National Association of Home Builders ("NAHB") has received the written consent of the petitioner to submit this *amicus curiae* brief.[1] The letter of consent has been filed with the Clerk of this Court. Respondents have declined consent.

The NAHB respectfully moves this Court for leave to file its *amicus curiae* brief in support of petitioner because it wishes to bring to the Court's attention a disturbing trend exemplified by the petitioner's case and which quietly underlies many of this Court's takings cases involving land use regulation – the use of the zoning power to exclude needed housing once a builder or property owner, in good faith reliance on a municipality's master plan and zoning, submits a housing development application to that municipality. These municipalities, while uttering the environmentally correct words, are, in reality, simply enhancing their exclusivity by singling out and taking through regulatory means private property, zoned for housing use, without compensating for it. According due deference to municipal land use action should not equate with turning a blind eye to action tantamount to municipal bad faith.

The NAHB represents over 200,000 builder and associate members throughout the United States. Its

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[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief and *amicus* paid for it. This brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has appeared before this Court as an *amicus curiae* or as "of counsel" on behalf of the property owner in prior takings cases involving land use regulation. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981);[2] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);[3] *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999).

Gus Bauman

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[2] Justice Brennan's dissent cited approvingly the NAHB brief. 450 U.S. at 643 n.6.

[3] The Court opinion cited approvingly the NAHB brief. 483 U.S. at 840.

TABLE OF CONTENTS

MOTION TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONER i

TABLE OF AUTHORITIES iv

SUMMARY OF ARGUMENT 1

REASONS FOR GRANTING THE WRIT 2

I. THE COURT BELOW, BY EQUATING THE "SUBSTANTIAL ADVANCEMENT" TEST OF A TAKING TO MERE "REASONABLENESS," NOT ONLY VIOLATES THIS COURT'S RULINGS BUT ALSO MAKES EASY MUNICIPAL HOUSING EXCLUSION 2

II. DESPITE THIS COURT'S CLEAR RULINGS THAT TAKINGS CLAIMS REQUIRE AD HOC, FACT SENSITIVE INQUIRIES, THE COURT BELOW REDEFINED TAKINGS ANALYSIS THEN DISMISSED THE CASE WITH NO SEARCHING INQUIRY, DESTROYING THE OWNER'S "DISTINCT INVESTMENT-BACKED EXPECTATIONS" 9

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980) . . . . . *passim*

Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 94 N.Y.2d 96 (1999) . . . . . *passim*

Bormann v. Board of Supervisors, 584 N.W.2d 309 (Iowa 1998) 6

City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 119 S. Ct. 1624 (1999) . . . . . *passim*

Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000 (Ind. 1989) 5

Dolan v. City of Tigard, 512 U.S. 374 (1994) . . . . . *passim*

Dolan v. City of Tigard, No. 94-1259-CV (Or. Cir. Ct. Nov. 18, 1997) 10

Ehrlich v. Culver City, 19 Cal. Rptr.2d 468 (Cal. Ct. App. 1993), *vacated and remanded*, 512 U.S. 1231 (1994) 3

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987) 9

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 258 Cal. Rptr. 893 (Cal. Ct. App. 1989) 9

Forseth v. Village of Sussex, 199 F.3d 363 (7th Cir. 2000) 7, 8

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 3, 10

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) . . . . . *passim*

Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992) 9

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 6

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) . . . . . *passim*

Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) . . . . . *passim*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 10

San Diego Gas and Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 3

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 6, 10

Suitum v. Tahoe Reg'l Planning Agency, No. CV-N-91-040-ECR (D. Nev. Dec. 9, 1998) 10

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 3, 6

Village of Willowbrook v. Olech, 120 S. Ct. 1073 (2000) 7

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 6

Yee v. City of Escondido, 503 U.S. 519 (1992) 3, 11

Other

Advisory Comm'n on Regulatory Barriers to Affordable Housing, *"Not In My Back Yard" – Removing Barriers to Affordable Housing* (1991) 7

H. Jane Lehman, *Accord Ends Fight Over Use of Land*, Wash. Post, July 17, 1993, at E1 9

Report of the President's Comm'n on Housing (1982) 7

Suitum Settles Longstanding Takings Case, Endangered Species & Wetlands Report, June 1999 10

SUMMARY OF ARGUMENT

The test for regulatory takings, which is loss of "economically viable use" or failure to "substantially advance legitimate state interests," is grounded in constitutional reason and Supreme Court precedent. The lower court, one with national influence in its rulings, chose to redefine the test by equating "substantial" with "reasonable," thereby enabling an exclusionary community to take private property for public use by destroying the owner's "distinct investment-backed expectations" (a takings standard articulated by this Court 22 years ago in another land use case in which the New York high court was rebuked for misinterpreting the Fifth Amendment).

This case, like eight other takings cases heard by this Court over the past score years, is really about the manipulation of zoning (and now the Constitution) to exclude needed housing. The justifications offered by the town for its action, which had nothing to do with preventing harmful use by the owner and everything to do with obtaining an open space resource for the town at no cost to anyone but the owner, were never accorded by the lower courts the searching factual inquiry required by this Court's decisions. A review of the remands of this Court's recent takings cases is instructive on the critical reason for having a trier of fact adjudge a takings claim.

REASONS FOR GRANTING THE WRIT

I.
THE COURT BELOW, BY EQUATING THE "SUBSTANTIAL ADVANCEMENT" TEST OF A TAKING TO MERE "REASONABLENESS," NOT ONLY VIOLATES THIS COURT'S RULINGS BUT ALSO MAKES EASY MUNICIPAL HOUSING EXCLUSION

Twenty years ago, in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court, in a unanimous opinion, enunciated the test to which all takings jurisprudence in state and federal courts is supposed to adhere:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land . . . .[1]

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[1] Below, the Bonnie Briar Syndicate indicated that this case does not implicate the second prong of the *Agins* test; thus, at issue here is exclusively the operation of the "substantial advancement" prong of *Agins*.

Since 1980, this Court has returned to this test in 1981,[2] 1985,[3] twice in 1987,[4] twice in 1992,[5] 1994,[6] and 1999,[7] each case building on the prior case, and each time stating that a zoning law must "substantially advance legitimate state interests" to avoid a taking. Moreover, since 1980, this Court has neither applied nor countenanced a different formula or altered the basic test, except to clarify in the context of governmental exactions of private property interests that a municipality must demonstrate "rough proportionality" between an imposed exaction and the impact of the proposed development. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Ehrlich v. Culver City*, 19 Cal. Rptr.2d 468 (Cal. Ct. App. 1993), *vacated and remanded*, 512 U.S. 1231 (1994); *City of Monterey v. Del*

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[2] *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 647 (1981) (Brennan, dissenting) (but representing the substantive views of five members of the Court).

[3] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

[4] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 n.3 (1987).

[5] *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).

[6] *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

[7] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 1636 (1999).

Monte Dunes at Monterey, 526 U.S. 687, 119 S. Ct. 1624, 1635 (1999).

By articulating the taking test to require "substantial advance[ment]," this Court consciously encapsulated a "verbal formulation" different from the "rational basis review" applied as the least stringent standard applicable under due process analysis.[8] In *Nollan v. California Coastal Commission*, this Court stated that "our opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims." 483 U.S. 825, 836 n.3 (1987). Rather, this Court explained, "our cases describe the condition for abridgement of property rights through the police power as 'substantial advanc[ing]' of a legitimate state interest." *Id.* at 841. Thus, this Court's jurisprudence is crystal clear on this point: takings claims are constitutionally different from due process or equal protection claims, and should not be analyzed through the rational basis lenses of those doctrines.

In *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96 (1999), the New York Court of Appeals simply ignored this Court's consistent rulings. By doing so, it was then able to deny the injured land owner its day in court to prove its case. The New York court fashioned a takings test requiring that zoning regulations be merely "reasonable," ruling that anything found "reasonable" then also meets the "substantial advancement" test. *Id.* at 108.

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[8] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 n.3 (1987).

It said: "Because zoning plaintiff's property for solely recreational use bears a reasonable relation to the legitimate objectives stated within [Local Law No. 6], the regulatory action here substantially advances those purposes". *Id.* This Orwellian reading of this Court's specific language – substantial equals reasonable – goes beyond the confusion some other state courts express when applying the "substantial advancement" test.

For example, in *Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000 (Ind. 1989), the Supreme Court of Indiana expressed the basis for such confusion when ruling on a state mining law preventing surface mining that might impact archeological resources. Reviewing the menu of choices provided under modern takings jurisprudence, the Indiana court stated:

> [T]here is authority that suggests that a land use regulation need only be "reasonably related" to the legitimate state interests to be valid, *Penn Central*, 438 U.S. 104, 131 [], or that it be "reasonably necessary to the effectuation of a substantial public purpose," *Penn Central*, 438 U.S. at 127 [], or that it "substantially advance" a legitimate state interest, *Agins*, 447 U.S. 255, 260 []. The Supreme Court has, as yet, been unable to settle on an exact standard for assessing the connection between the regulation and the state interest.

542 N.E.2d at 1005. The Indiana court prefaced its comments above by stating: "In examining the nexus between the land use regulation and the state interest, we have relied on the phrasing of earlier Supreme Court cases, and have required that there be a 'substantial relationship' between the two." *Id.*

In *Bormann v. Board of Supervisors*, 584 N.W.2d 309, 316 (Iowa 1998), a takings case involving the adoption of an agricultural district, the Supreme Court of Iowa recently misunderstood the regulatory takings test, reciting a "reasonableness" standard in the same confused manner as the New York court did in *Bonnie Briar*. In so doing, the Iowa court managed to discuss the law of takings without ever referring to the alternative prong of the *Agins* test, the "substantial advancement" prong.

Since this Court first confronted the constitutional problem presented by inverse condemnation in *Agins*, a remarkable number of its regulatory takings cases have, at heart, concerned housing exclusion: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624 (1999). These cases almost without

exception were about use of the police power to obtain open space or very low density in exclusive suburban communities despite what the zoning permitted and despite federal tax and mortgage policies encouraging new housing for a growing nation. Such housing exclusion is precisely what occurred in *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, and it is precisely what the New York court condoned by taking this Court's constitutional standard for evaluating a taking and twisting it.

The wrong takings jurisprudence applied by the New York Court of Appeals, and exhibited elsewhere as well, fosters this type of housing exclusion nationwide.[9] When courts misapply takings law, as here, the door opens wide for municipalities to engage in behavior designed not for the advancement of legitimate and laudable environmental goals but for behavior designed to exclude new homes and people.

Land use behavior tainted by municipal bad faith has been the subject of this Court's recent attention in *Del Monte Dunes* as well as *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000), an equal protection case. Similarly, in the recent *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000), the court reversed a district court's dismissal of equal protection claims in the context of land use. In *Forseth*, the landowner alleged that the village board unconstitutionally

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[9] *See generally* Advisory Comm'n on Regulatory Barriers to Affordable Housing, *"Not In My Back Yard" – Removing Barriers to Affordable Housing*, at 2-5 (1991); Report of the President's Comm'n on Housing, at 199-208 (1982).

conditioned approval of an as-of-right development project upon the landowner's sale of a portion of the property to the village board president personally. *Id.* at 366-67. The court remanded the case.

One purpose in formulating a takings standard different from the "rational basis" standard of due process analysis, in both kind and degree, was to smoke out bad faith by requiring more than the abstract possibility of a rational basis for application of a zoning law. Here, where close examination of the town's stated rationales for what it did does not survive even cursory scrutiny, *see Reason II. below*, the underlying objective of the Town of Mamaroneck becomes clear: to exclude new housing (therefore people) at the singular expense of the Bonnie Briar Syndicate's use of its land, keeping it in open space for the benefit of the neighbors and town and at no cost to anyone but for the targeted landowner.

Conflicting application of takings law simply encourages litigation, harms consumers by increasing housing prices, decreases liquidity in the real estate development markets, and is fundamentally unfair and unconstitutional.

II.
DESPITE THIS COURT'S CLEAR RULINGS THAT TAKINGS CLAIMS REQUIRE AD HOC, FACT SENSITIVE INQUIRIES, THE COURT BELOW REDEFINED TAKINGS ANALYSIS THEN DISMISSED THE CASE WITH NO SEARCHING INQUIRY, DESTROYING THE OWNER'S "DISTINCT INVESTMENT-BACKED EXPECTATIONS"

The court below, after redefining this Court's test for a regulatory taking, then dismissed the takings claim of the Bonnie Briar Syndicate on motions for summary judgment; no trial ever took place. Yet, since *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), this Court has repeatedly stressed the "essentially ad hoc, factual" nature of takings claims and the importance of trial. *Id.* at 124. For example, in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), this Court reversed and remanded.[10] In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court reversed and remanded.[11] In *Dolan v. City of Tigard*,

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[10] On remand, the state appeals court found no taking under both prongs of the *Agins* test. 258 Cal. Rptr. 893 (Cal. Ct. App. 1989).

[11] On remand, the state supreme court found a taking and ordered a trial. 424 S.E.2d 484 (S.C. 1992). The state then settled with David Lucas, bought the property it tried to keep from being developed, and then auctioned the property to the highest bidder for development. H. Jane Lehman, *Accord Ends Fight Over Use of Land*, Wash. Post,

(continued...)

512 U.S. 374 (1994), this Court reversed and remanded.[12] And in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), this Court reversed and remanded.[13]

As recently as last term, this Court in *Del Monte Dunes* addressed the role of the trier of fact and reiterated the fact-bound nature of takings claims, stating:

> Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that "there must be an exercise of eminent domain and compensation to sustain the act . . . depends upon the particular facts." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *accord Keystone Bituminous Coal*, [480 U.S.] at 473-74. Consistent with this understanding,

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[11] (...continued)
July 17, 1993, at E1.

[12] On remand, during jury trial in state court, the city settled with Florence Dolan for $1.5 million, granting her a building permit in exchange for two property easements. No. 94-1259-CV (Or. Cir. Ct. Nov. 18, 1997).

[13] On remand, in denying the agency's summary judgment motion, the federal district court indicated a likelihood of finding a taking. No. CV-N-91-040-ECR (D. Nev. Dec. 9, 1998). The agency then settled the case before trial, paying Bernadine Suitum for her property and costs in exchange for her agreement that the district court opinion and order be withdrawn. *Suitum Settles Longstanding Takings Case*, Endangered Species & Wetlands Report, June 1999, at 7.

> we have described determinations of liability in regulatory takings cases as "'essentially ad hoc, factual inquiries,'" *Lucas*, [505 U.S.] at 1015 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)), requiring "complex factual assessments of the purposes and economic effects of government actions," *Yee*, 503 U.S. at 523.

119 S. Ct. at 1644.

Here, all three of the town's stated objectives – recreational opportunities, open space, and flood control – when confronted with the landowner's "distinct investment-backed expectations" (a takings standard first enunciated in *Penn Central*, 438 U.S. at 124) and submitted development application, present clear factual issues requiring trial. Neither the town's stated objectives nor the landowner's takings claim were suited for summary disposition.

The town singled out and downzoned the Bonnie Briar property based in part on the town's claim that it sought to provide Mamaroneck citizens with recreational opportunities. Did the downzoning substantially advance the town's recreational opportunity rationale? No. Bonnie Briar has operated the sought-after recreational opportunity since 1921 and has never hinted that it would cease providing this recreational opportunity. Indeed, when the town was presented with the opportunity to convert this private golf club into a public course operated for the benefit of all the town's residents, the town declined to substantially

advance its citizens recreational opportunities, opting instead to downzone Bonnie Briar for open space. Moreover, the development plan submitted by the owner contemplated no alteration in the recreational opportunities; rather, the plan submitted to the town conformed with the town's own comprehensive plan by retaining the golf course.

The town's second rationale – retention of open space – suffers from the same failures: the downzoning did not substantially advance the state interest of retaining open space. The owner's residential application would retain the entire 18-hole golf course and construct housing on a fifth of the total property, in conformance with the zoning, the town master plan, and the recommendations of the town's consultant.

The town's final rationale – use of Bonnie Briar's land for a municipal flood control device – seems the most outrageous and the least suited for summary disposition. Having failed to provide appropriate flood control measures using more traditional methods (where the whole community bears the cost), the town baldly offers as one of its objectives that it intends to use Bonnie Briar's privately owned land for this public purpose. Thus the town applied a zoning provision for the *express* purpose of appropriating Bonnie Briar's property (without compensation) during times of flooding, an action especially egregious since the owner did nothing to contribute to the flooding.

Clearly, reasonable deference must be accorded municipal actions in land use regulation. But, as this Court

noted in *Del Monte Dunes*, 119 S. Ct. at 1637, deference does not mean that municipalities are immune from searching inquiry when a citizen claims constitutional injury. This Court made the same important point in both *Lucas*, 505 U.S. at 1031-32, and *Dolan*, 512 U.S. at 392.

While a trier of fact certainly might determine that the town's rationales for what it did to Bonnie Briar constitute the required substantial advancement of legitimate state interests, in *Bonnie Briar*, no trier of fact ever heard the disputed evidence. If the lower court opinion by the influential New York Court of Appeals is allowed to stand, despite what this Court has said consistently since *Penn Central* (when this Court rebuked the New York high court for misinterpreting the law of regulatory takings), then no owner or builder with an as-applied takings claim has much chance of being allowed to try to prove its case.

CONCLUSION

For the above reasons, the *amicus* respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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